

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF DELAWARE**

BIOVAIL LABORATORIES	)	
INTERNATIONAL SRL	)	
a corporation of Barbados,	)	
	)	
Plaintiff,	)	C.A. No. 05-586-KAJ
v.	)	(consolidated case)
	)	
ANDRX PHARMACEUTICALS, LLC	)	
and ANDRX CORPORATION	)	
	)	
Defendants.	)	

**OPPOSITION TO BIOVAIL'S MOTION FOR MORE TIME TO DEVELOP  
NEW EXPERT EVIDENCE IN OPPOSITION TO ANDRX'S MOTION FOR  
SUMMARY JUDGMENT OF NON-INFRINGEMENT OF THE '791 PATENT**

Although styled as a non-substantive motion for an extension, Biovail's motion actually is a backdoor request to develop and serve new expert testimony in opposition to Andrx's motion for summary judgment of non-infringement of the '791 patent.

If this dispute had been merely a matter of accommodating attorneys' schedules to respond to an eight and a half page motion, Biovail either would have accepted the additional week Andrx offered, or made a counter-offer. Biovail did neither. Instead, Biovail insisted on more than a month of extra time.

Now that Andrx has pointed out the substantive deficiencies in Biovail's expert evidence with respect to the '791 patent, Biovail is demanding extra time to develop and present new expert evidence in opposition to Andrx's motion for summary judgment. *See* Biovail Motion at 2 (regarding need to work with Dr. Brenner). Dr. Brenner already submitted two expert reports on the '791 patent – opening and rebuttal. A third report from Dr. Brenner in response to the summary judgment motion should be out of the question. As a matter of law, such new expert evidence in opposition to summary

judgment should be excluded (if presented), as a violation of the Court's Scheduling Order and Fed. R. Civ. P. 37(c). See *Astrazeneca v. Mutual Pharm.*, 278 F. Supp. 2d 491 (E.D. Pa. 2003) (excluding new expert evidence introduced for the first time in expert affidavit offered in opposition to summary judgment); *Stein v. Foamex Intern.*, No. Civ.A. 002356, 2001 WL 936566, at \*6 (E.D. Pa. Aug. 15, 2001) (same).<sup>1</sup>

Further, Biovail's reference to the case dispositive motion deadline is misleading insofar as Biovail suggests Andrx's motion on the '791 patent is somehow premature. The '791 patent was the only patent being litigated in this case when fact discovery closed and the expert reports were served, under the Third Amended Scheduling Order. It was not until a month after the expert reports on the '791 patent that Biovail filed a separate action, asserting a newly issued patent, U.S. Patent No. 7,108,866 (the '866 patent). In the interests of efficiency for the Court and the parties, Andrx agreed to consolidate the actions and agreed to additional time for expedited fact discovery on the '866 patent, and expert report dates for the '866 patent, along with a case dispositive motion date of May 18, 2007 for the consolidated action.

Finally, Andrx notes that Biovail's unreasonable position on the briefing is only the most recent dilatory and obstructionist position taken by Biovail in the past two months. Biovail apparently anticipates that the re-assignment of this action to a new District Judge will mean a *de facto* lack of consequences or accountability for even the most extreme transgressions during this period. Otherwise, Biovail surely would not

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<sup>1</sup> Two other aspects of the *Astrazeneca* case merit observation. First, just as in this case, the motion for summary judgment came after expert reports but before expert depositions, which were postponed by agreement of the parties. 278 F.Supp.2d at 502. Second, Biovail's lead counsel, Joseph O'Malley, was a member of the firm that argued for and obtained exclusion of the new expert evidence introduced in opposition to summary judgment.

have risked steadfastly refusing to provide deposition dates for even a single one of the witnesses Andrx requested back on September 27, 2006, requested again on October 9, 2006, and requested yet again on November 9, 2006. The parties are scheduled to address this issue with the Court on December 18, 2006.

The motion should be denied, and Biovail should be compelled to file proper opposition papers (i.e., not based on any new expert evidence) on December 18, 2006. That additional week should be sufficient to respond to the motion filed by Andrx, which is under ten pages in length.

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**CERTIFICATE OF SERVICE**

I, Richard L. Horwitz, hereby certify that on December 11, 2006, the attached document was hand-delivered on the following persons and was electronically filed with the Clerk of the Court using CM/ECF which will send notification of such filing(s) to the following and the document is available for viewing and downloading from CM/ECF.

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